

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ANGEL FERNANDEZ,

Petitioner,

v.

RONALD FRAKER,

Respondent.

CASE NO. C12-5426 RBL-JRC

ORDER ADOPTING A REPORT
AND RECOMMENDATION

The Court having reviewed the Report and Recommendation of the Hon. J. Richard Creatura, United States Magistrate Judge, objections to the Report and Recommendation [Dkt. #12], and the remaining record, does hereby find and Order:

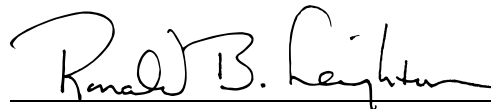
- (1) The Court adopts the Report and Recommendation;
- (2) This petition is dismissed as time barred without reaching the merits. Petitioner may not use an alleged jury instruction defect to claim actual innocence. The actual innocence exception to procedural default requires evidence of innocence that was not presented at trial and that evidence must show that no reasonable jury would have convicted the petitioner. *Schlup v. Delo*, 513 U.S. 298, 329 (1995). Petitioner failed to produce any evidence of innocence.

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1 (3) The Court will not grant a Certificate of Appeal.

2 DATED this 11th day of October, 2012.

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5 Ronald B. Leighton
6 United States District Judge
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